Supreme Court, U.S.
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No. 02-509

IN THE

Supreme Court of the United States

JAMES SERVAIS, *et al.*,

Petitioners,

v.

KRAFT FOODS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF

SAMUEL D. HEINS
DANIEL E. GUSTAFSON
HEINS, MILLS & OLSON, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 338-4605

EDWARD LABATON
Counsel of Record
THOMAS A. DUBBS
RICHARD T. JOFFE
GOODKIND LABATON RUDOFF & SUCHAROW LLP
100 Park Avenue
New York, NY 10017
(212) 907-0700

Attorneys for Petitioners

(Additional Counsel listed on signature page)

177380

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Introduction 1

I. The Federal Questions Presented Are Properly Before The Court 2

II. Respondents Have Not Explained Away The Wisconsin Decision's Use Of Classic Field Preemption Language 4

III. Respondents Have Not Reconciled The Wisconsin Decision With The Authorities Requiring Preemption As A Prerequisite For Application Of The Federal Filed Rate Doctrine 6

IV. Respondents Do Not Deny The Conflict Between The Wisconsin Decision And The Long-established Policy Of The USDA 7

Conclusion 8

TABLE OF CITED AUTHORITIES

Page

CASES

Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 7

Conroy v. Aniskoff, 507 U.S. 511 (1993) 2

Enterprise Irrigation District v. Canal Co., 243 U.S. 157 (1917) 5

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 1

Frisby v. Schultz, 487 U.S. 474 (1988) 3

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 4

Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922) 7

Kywanda v. Kywanda, 200 Wis. 2d 26, 546 N.W.2d 440 (1996) 4

Michigan v. Long, 463 U.S. 1032 (1983) 3

Cited Authorities

	Page
Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951)	6
National Broker Marketing Ass'n v. United States, 436 U.S. 816 (1978)	1
Orr v. Orr, 440 U.S. 268 (1979)	3
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986)	7
State v. Clansen, 105 Wis. 2d 231, 313 N.W.2d 819 (1982)	4
Sternbridge v. Georgia, 343 U.S. 541 (1952)	3-4
Tumey v. Ohio, 273 U.S. 510 (1927)	2
United Air Lines v. Mahin, 410 U.S. 623 (1973)	3
STATUTE	
28 U.S.C. § 1257(a)	2

Cited Authorities

Page

OTHER AUTHORITY

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller *Supreme Court Practice* (8th ed. 2002) 2

INTRODUCTION

Petitioners have presented a State court decision that directly contradicts a decision of this Court and creates a split of authority with various federal cases and with the policy of the USDA. As respondents fear a summary reversal, they attempt to fool the Court into believing there is a fatal vehicle problem with this case — an adequate and independent state ground — when no such problem does or could exist.

The Wisconsin Decision[1] directly conflicts with a decision of this Court, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and creates a split of authority due to its conflicts with federal appellate decisions and federal district court decisions, including two that have been summarily affirmed by this Court. *See* Pet. at 16-20. Equally important, the Wisconsin Decision is injurious to every dairy farmer in the Nation, violative of USDA policy, and is a question of utmost "importance . . . for the agricultural community and for the administration of the antitrust laws." *National Broker Marketing Association v. United States*, 436 U.S. 816, 820 (1978).

Accordingly, the Court should grant the Petition for Writ of Certiorari and consider summary reversal. The Court may also want to consider calling for the views of the USDA through the Solicitor General.

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1. Defined terms herein have the same meaning as in the Petition.

I.

THE FEDERAL QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

Respondents do not contest that the judgment by an equally-divided panel of the Wisconsin Supreme Court affirming the Wisconsin Court of Appeals (the "Wisconsin Decision") is reviewable under § 1257(a) or *Tumey v. Ohio*, 273 U.S. 510, 515 (1927); *see* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice* 167 (8th ed. 2002).[2]

Nor do they claim a viable federal question was not raised and preserved in the state proceedings.

Rather, they argue that because the three Justices who voted in favor of affirmance *might* have affirmed on the basis of an *undisclosed* state ground, that means there is both an adequate and independent state ground to justify denial of the petition.

But this Court long ago foreclosed such argument.

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2. *Conroy v. Aniskoff*, 507 U.S. 511 (1993), was relied upon in the Petition for the proposition that this Court can jurisdictionally review a state supreme court judgment by an equally-divided supreme court where that decision acts as an affirmance. Respondents rely on it for a different proposition, namely, that where a state court acknowledges it is divided on a federal question, that effectively terminates any search for an independent and adequate state ground. However, the latter point does not undercut the former.

See Michigan v. Long, 463 U.S. 1032 (1983). Although Respondents cite the case, they disregard its teaching that where a

> decision fairly appears to rest primarily on federal law, or to be *interwoven* with the federal law, and when the adequacy and independence of any possible state law ground is *not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

Id. at 1040-41 (emphasis added).

In addition, it has long been the case that rank speculation as to a possible adequate and independent state ground is insufficient. As the Court has stated, the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973); *see Orr v. Orr*, 440 U.S. 268, 276-77 (1979); *cf. Frisby v. Schultz*, 487 U.S. 474 (1988) (Court did not speculate concerning other state grounds, but granted certiorari of an en banc decision without opinion by an equally divided court of appeals where a narrowing construction of a statute on state grounds could have precluded a possible First Amendment challenge).

In short, because the judgment below "*might* have rested on a nonfederal ground", *Sternbridge v. Georgia*, 343 U.S.

541, 543 (1952) (emphasis in original), is not sufficient to warrant denial.[3]

Finally, Respondents distort the proceedings below where Petitioners argued that, because there was no field preemption under federal law, *only* the state version of the filed rate doctrine could *possibly* apply, which Petitioners argued, it did not, given prior Wisconsin case law. The chances of any Justice both adopting Petitioners' argument below and affirming at the same time on some other ground not presented are both miniscule and totally speculative.

II.

RESPONDENTS HAVE NOT EXPLAINED AWAY THE WISCONSIN DECISION'S USE OF CLASSIC FIELD PREEMPTION LANGUAGE

Respondents do not try to justify the Wisconsin Decision by arguing that the AAA and its FMMOs preempt the field of milk marketing. Respondents also do not deny that the Wisconsin Decision uses classic field preemption language when it justifies its holding on the ground that "to calculate

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3. Respondents also ignore the fact that the reasoning and analysis of opinions affirmed by equally-divided courts are, in Wisconsin and in this Court, treated as persuasive authority. *See Kywanda v. Kywanda*, 200 Wis. 2d 26, 34, 546 N.W.2d 440, 444 (1996); *State v. Clansen*, 105 Wis. 2d 231, 239, 313 N.W.2d 819, 823 (1982). For example, this Court analyzed in some depth the district court opinion in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 381-83, 391-98 (1982), without hand-wringing or speculation concerning the *en banc* affirmance without opinion by the equally divided court of appeals. Indeed, this Court treated the district court's reasoning as the reasoning of the court of appeals and reversed the court of appeals based on this Court's analysis of the district court's reasoning. *See id.* at 403.

the damages Servais claims . . . would undermine a congressional scheme of uniform rate regulation." App. at 12a; Op. Br. at 6. Instead, Respondents attempt to insert new language into the Wisconsin Decision, claiming that it

> did not in any way suggest that the federal milk marketing orders in question set uniform rates *for the entire country*; instead, it implied only that the federal milk marketing orders set uniform rates *for the regions covered by the orders.*

Op. Br. at 6 (emphasis in Opposition Brief). Respondents do not cite to any such qualifying statement in the Wisconsin Decision — because there is none.

Even if the Wisconsin Decision were so limited, given that Wisconsin is completely covered geographically by four separate FMMOs, each covering a different part of the state, the distinction is irrelevant. *See* Wis. S. Ct. Resp. App. at 16. The Wisconsin Decision held that, at the very least, where FMMOs are in place, as in all of Wisconsin, the AAA is field preemptive and the federal filed rate doctrine bars state antitrust causes of action.[4]

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4. Respondents rely on the Wisconsin Decision's statement in a footnote that "the federal government has not preempted the field for establishing milk orders." Op. Br. at 5 (quoting App. at 8a n.3). This statement contradicts both the text and holding of the Wisconsin Decision, and should not be allowed to be "a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917).

III.

RESPONDENTS HAVE NOT RECONCILED THE WISCONSIN DECISION WITH THE AUTHORITIES REQUIRING PREEMPTION AS A PREREQUISITE FOR APPLICATION OF THE FEDERAL FILED RATE DOCTRINE

Respondents argue that field preemption is not a prerequisite for application of the federal filed rate doctrine, because, according to Respondents, the federal filed rate doctrine does not prevent state regulation, so long as the state regulation does not "challenge[ ] the reasonableness of federally established rates." Op. Br. at 6. Respondents are essentially arguing that *conflict* preemption involving federally set rates is the *only* basis for application of the federal filed rate doctrine, and that conflict preemption is present here.

There are two fatal flaws in Respondents' argument.

First, Respondents have not found a single case — other than the Wisconsin Decision — that has ever applied the federal filed rate doctrine to bar relief under a state cause of action in the absence of field preemption.[5]

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5. Respondents attempt to support their argument with a citation to *Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246 (1951), *see* Op. Br. at 6, but *Montana-Dakota* barred relief under the Federal Power Act, and not under any state cause of action, *see id.* at 248. Respondents also argue that the field preemption cases cited in the Petition do not use the term "field preemption," but that is certainly the kind of preemption found by those cases. *See* Pet. at 20-25. Respondents also argue baselessly that preemption

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Second, under Respondents' logic, there could be no holding of conflict preemption here because they implicitly acknowledge there could be no conflict between the AAA, the FMMOs and the Wisconsin antitrust laws because nothing more than *minimum* prices are set by the AAA and the FMMOs, and any damages award would be, in fact, permissibly *higher* — not lower — than the set minimum, to compensate for the downward manipulation of the price of bulk cheese.

IV.

RESPONDENTS DO NOT DENY THE CONFLICT BETWEEN THE WISCONSIN DECISION AND THE LONG-ESTABLISHED POLICY OF THE USDA

Respondents make no attempt to deny the conflict between the United States Department of Agriculture's long-standing policy and the Wisconsin Decision based on the fact that, under USDA policy, the FMMO minimum price does not involve any regulatory discretion or subjective judgments of reasonableness, but rather, is "arrived at in the market-place rather than by the Government." Pet. at 26. This goes to the core of any filed rate case: Is the "rate" set by an administrative agency or by the market? Here, the

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"could not have occurred" in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), and *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *see* Op. Br. at 7, although the Interstate Commerce Act, "is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-19, 331-32 (1981).

administrative agency *itself* says that the prices sought to be used by Petitioners in damages calculations are market prices.

Instead of responding to this, Respondents merely try to change the subject to the irrelevant point that other cases have not addressed the exact same formulation of the issues as is presented in this case. *See* Op. Br. at 8 ("petitioners allege no split of authority").[6]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, this Court should grant a writ of certiorari to the Wisconsin Supreme Court to summarily reverse the decision, or, alternatively, to grant plenary review of the questions presented in the Petition.

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6. If the USDA has not previously expressed its opinion on the precise question of whether the federal filed rate doctrine can bar state claims involving FMMOs, that, no doubt, is because no one ever previously tried to apply the federal filed rate doctrine to FMMOs. Of course, as noted previously, the Court can simply ask the USDA, through the Solicitor General, for its views.

Respondents' final argument, that the Federal Trade Commission and Commodity Futures Trading Commission "have already investigated petitioners' claims and determined that there is no basis for further inquiry," *see* Op. Br. at 8, is misleading and irrelevant. Neither of these agencies is charged with enforcing either FMMOs or Wisconsin's antitrust laws and neither based its decision on the filed rate doctrine or whether FMMOs involve regulatory discretion or subjective judgments of reasonableness. *See* Wis. S. Ct. Resp. App. 154-56, 191-92.

Respectfully submitted,

EDWARD LABATON
Counsel of Record
THOMAS A. DUBBS
RICHARD T. JOFFE
GOODKIND LABATON RUDOFF
& SUCHAROW LLP
100 Park Avenue
New York, NY 10017
(212) 907-0700

KENNETH A. WEXLER
KENNETH A. WEXLER
& ASSOCIATES
One North LaSalle Street
Suite 2000
Chicago, IL 60602
(312) 346-2222

MICHAEL L. STOKER
JOHNS & FLAHERTY, S.C.
205 Fifth Avenue South
Suite 600
P.O. Box 1626
La Crosse, WI 54602
(608) 784-5678

SAMUEL D. HEINS
DANIEL E. GUSTAFSON
HEINS, MILLS & OLSON, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 338-4605

Attorneys for Petitioners